1968. Re-hearing was denied August 29, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3), petitioner having asserted in the Courts below rights, privileges and immunities conferred by the Constitution of the United States of America.

QUESTIONS INVOLVED

I

Whether due process of law and the right to be secure against unreasonable search and seizures, as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution was denied petitioner by the receipt as evidence of various alleged gambling paraphernalia obtained from petitioner's residence by police officers without his consent or permission and without having in their possession a Search Warrant.

II

Whether due process of law, guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution was denied petitioner by receipt as evidence against him of statements allegedly made by the petitioner at the time of his arrest, when it was admitted by the State that the arresting officers, at no time advised petitioner of his right to remain silent and/or to have present an attorney.

III

Whether due process of law, as guaranteed by the Fourteenth Amendment was denied petitioner by the failure of the trial Court to charge the law relative to "entrapment" when there was evidence before the jury and the Court that there had been an entrapment of the petitioner by the police officers.

STATEMENT OF CASE

This action originated in Greenville County South Carolina. The defendant (petitioner herein), his wife and several children resided in a private dwelling just outside of the City of Greenville. On December 31, 1965, the petitioner was in his residence with his wife and children when officers of the State Law Enforcement Division and officers of the Greenville County Sheriff's Department, knocked at the door of the residence. The petitioner answered the door and was told that the police wanted in. He asked the officers if they had a Search Warrant and was told that they had none. The officers then informed him that they had an Arrest Warrant and that he was under arrest. They entered the residence and, according to the officers, asked permission to search. Whether permission was verbally given or not, the officers did search the premises and the personal effects of the petitioner's wife. They seized a large quantity of alleged evidence and took money from the pocketbook of petitioner's wife. Both the seized physical evidence and the money was later introduced against the petitioner, over petitioner's objection. It was admitted by the police officers that there was no Search Warrant; that they did not advise the petitioner of his right to remain silent; that they questioned him without his attorneys being present; and did not advise him of his right to have an attorney present.

Upon the trial of the matter and at the completion of the State's case, all appropriate Motions were made and refused by the Court. The petitioner offered no testimony or evidence in his own behalf. He was found guilty. Appropriate Motions for a new trial and for a setting aside of the verdict were made and refused. An Appeal was taken to the South Carolina Supreme Court on the questions presented herein and other questions of law. The conviction was affirmed and Re-hearing was denied.

REASONS FOR GRANTING THE WRIT

I

THE PETITIONER WAS DENIED DUE PROCESS OF LAW, GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, BY THE RECEIPT AS EVIDENCE OF VARIOUS ALLEGED GAMBLING PARAPHERNALIA, SEIZED FROM THE PETITIONER'S RESIDENCE BY POLICE OFFICERS WITHOUT HIS CONSENT OR PERMISSION AND WITHOUT THE EXISTENCE OR POSSESSION OF A SEARCH WARRANT.

The police officers, five (5) in number, appeared at the residence of the petitioner on December 31, 1965. They knocked on the door and when petitioner appeared he was advised that the officers had an Arrest Warrant and that he was under arrest. Then according to the police officers, the petitioner was asked if they could "look around". They entered the premises, searched the petitioner's wife, from whom they secured some money, later introduced as evidence, and from different parts of the house, seized notes, blank betting cards on sports and other such alleged gambling paraphernalia.

During the course of the trial, all of the State's witnesses admitted that no Search Warrant was issued and that none was sought, all of the participating officers agreed on this basic fact. The chief arresting officer was Greenville County Chief Deputy Sheriff Bill Coleman. When being cross examined as to the arrest itself (Tr., p. 51) Chief Coleman testified as follows:

"Q. You knew exactly what you were looking for, did you not?

A. Yes, sir.

Q. Did you make the statement—did I understand you correctly to say you went out to Mr. Porter's house to serve a warrant and quote "see what evidence we could pick up at the house?"

A. Yes, sir.

Q. You are an experienced officer?

A. Well, I've been on the force about ten and a half years.

Q. You've had occasion to make any arrests, have you not?

A. Yes, sir.

Q. You knew exactly what you were going up there to pick up?

A. I knew we were hunting gambling paraphernalia.

Q. At no time did you have a search warrant, did you?

A. No, sir."

What this witness said, without equivocation, is that they used the Arrest Warrant for the specific purpose of securing physical evidence from the search of the defendant's residence, while having no search warrant and knowing that they had no search warrant. He used the arrest as a subterfuge for the illegal procurement of evidence.

The plain fact is, as is evident from reading the transcript of this trial, that the officers having no evidence whatsoever, secured an Arrest Warrant, used the warrant itself as an illegal method of securing the evidence which they needed in order to convict this defendant. The defendant would not have been convicted without the introduction of this evidence. The State relied upon the additional ground, in order to make legal the illegal search, that the defendant gave consent to the search. This is obvious nonsense. The State Officers came to the door of the residence of the defendant and notified him that he was under arrest. He asked for a Search Warrant and was told that they had none, but that he was under arrest. At this point, it is con-

tended by the State that the defendant was asked if they could look around his house and the defendant said for them to help themselves (Tr., p. 29). At no time was this defendant advised of his constitutional rights, even though under arrest. Objection was made to all of this line of testimony and to the admissibility of evidence obtained in the method in which it was obtained (Tr., pp. 29-31).

The Federal Courts of the United States, and more particularly, the United States Court, have found numerous occasions in recent years, to pass upon this problem. The Supreme Court, the Courts of Appeal and the District Courts have uniformly held that where the evidence is the fruits of an illegal search, the evidence is totally inadmissible. *Mapp v. Ohio,* 367 U. S. 643; *U. S. v. Como,* 340 Fed. eral (2d) 891; *Weed v. U. S.,* 340 Federal (2d) 827

The cases involving this type of a search, upon these grounds are numerous. *Higgins v. U. S.,* 209 Fed. (2d) 819, involved a case where drugs were seized in the defendant's room, without a warrant. The officers asked the defendant if they could look around his room and the defendant said they could and were welcome to. The Court assumed, for purposes of argument, that this was, in fact, true, but held:

> "Even so, we think the record does not support finding that appellant consented to the search."
>
> "Words or acts that would show consent in some circumstances do not show it in others. Nonresistance to the orders or suggestions of the police is not infrequent; true consent, free of fear or pressure, is not so readily to be found."
>
> "If a valid confession proceeds a search by police, permission may show true consent to the search. But no sane man, who denies his guilt would actually be willing that policemen search his room, for contraband, which is certain to be discovered. It follows that when police identify themselves as such, search a room and find contraband in it, the occupants words or signs of

acquiescence in the search, accompanied by the denial of guilt do not show consent."

In *Johnson v. U. S.*, 333 U. S. 10, 68 U. S. Sp. Ct. 267, officers obtained entry to a defendant's residence under the color of their office. The Court held that the fruits of such a search were not admissible and went on to say:

> "Entry to a defendant's living quarters, which was the beginning of the search, was demanded under the color of office. It was granted in submission of authority rather than as an understanding and intentional waiver of a constitutional right."

In *Judd v. U. S.*, 190 Fed. (2d) 649, the Court dealt with an identical question and held:

> "The government must show a consent that is unequivocal and specific, freely and intelligently given. Thus, 'invitations' to enter one's house extended to armed officers of the law, who demand entrance are usually to be considered as invitations secured by force. A like view has been taken where an officer displays his badge and declares that he has come to make a search even where the householder replied 'all right.'" (*U. S. v. Marra,* 40 Fed. (2d) 271.)
>
> "This burden on the Government is particularly heavy in cases where the individual is under arrest. Nonresistance to the Orders of suggestion of the police is not infrequent in such a situation; true consent, free of fear of pressure, is not so easily found. In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent not in accordance with human experience and explainable only on the basis of physical or moral compulsion."

In *U. S. v. Marra,* 40 Fed. (2d) 271, the Court held:

> "Under the facts in this case, I find that there was no invitation given by the defendant to the prohibition officers to search the premises. The statement of the officer to the defendant, on presenting themselves at the door, that they were officers and were going to inspect the premises and the reply of the defendant, 'all

right', might be said to be acquiescence, but under the circumstances did not amount to an invitation to enter and search."

An interesting parallel case to the instant case is that of *U. S. v. Lantrip,* 74 Fed. Supp. 946. This case had an identical problem with that in *U. S. Slusser,* 270 Fed. 818, and said:

> "The case of *U. S. v. Slusser,* 270 Fed. 818, is in point. Prohibition officers and two city policemen went to the defendant's residence, knocked and were admitted. One of the officers displayed his badge and said that they were there to look for liquor. Slusser said: 'all right, go ahead'. Certain bottles for whiskey were found. The officers had no search warrant. The Court held the search to be an illegal one and that the so-called consent given did not amount to a waiver of his constitutional rights, but on the contrary, should be attributed to a peaceful submission to officers of the law."
>
> "It is said that if such arrests and searches cannot be made, law enforcement will be more difficult. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveilance, which they seemed to think was a greater danger to free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

Weed v. U. S., 340 Fed. (2d) 827, contained an interesting discussion on the defendant being in custody at the time he allegedly gave consent:

> "Suffice it to say that every reasonable presumption is against an accused's waiver of his constitutional rights, particularly when he is in **custody,** and the consent must be specific, unequivocal and freely and intelligently given. Particular words of consent

must always be weighed in light of the atmosphere and and totally of circumstances in which they are spoken in order to determine the intent and voluntariness of the words."

Gadlin v. U. S., 326 Fed. (2d) 666, held:

"Invitations to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force."

A United States case decided July 31, 1967, *U. S. v. Shropshire,* had an identical question where the police entered the residence and requested permission to search. Shropshire allegedly granted permission, saying "go right ahead". The search uncovered a number of counterfeit twenty dollar bills and the Court held that it was incredible to think that Shropshire would have voluntarily consented to a search which he knew would disclose incriminating evidence. His words should be considered to be an involuntary submission to authority and insufficient to waive a constitutional right.

The identical questions decided above are present in the instant case. The burden was upon the State to prove consent and they failed to do so. The search, in fact, did turn up evidence which the State relies upon as "gambling paraphernalia". The officers of the State after having arrested the defendant, in his own residence, and without warning him of his constitutional rights, asked to search the premises. It is completely unbelievable that Porter would have consented to this search, knowing that evidence was in the house. It is contended therefore, that all of the testimony concerning the alleged seized evidence and the evidence seized was inadmissible in evidence.

II

THE PETITIONER WAS DENIED DUE PROCESS OF LAW, GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BY THE RECEIPT AS EVIDENCE OF STATEMENTS ALLEGEDLY MADE BY THE PETITIONER AT THE TIME OF HIS ARREST, WHEN IT WAS ADMITTED BY THE STATE OF SOUTH CAROLINA THAT THE ARRESTING OFFICERS, AT NO TIME, ADVISED PETITIONER OF HIS RIGHT TO REMAIN SILENT AND/OR TO HAVE PRESENT AN ATTORNEY PRIOR TO QUESTIONING.

The State of South Carolina based its' right to search the residence of the petitioner on a statement allegedly made by the petitioner immediately after his arrest. Police Officer Shirley was allowed to testify at length as to remarks made by the petitioner. A full objection to such remarks and the testimony concerning the remarks was made by the petitioner on the ground that the State had not established that the petitioner had been advised of his constitutional right not to speak or not to cooperate, but the testimony was admitted.

"Q. Did you place him under arrest right at the front door?

A. It was inside—we were inside after he unlocked the door.

Q. Did you at that time advise him of his constitutional rights to remain silent, or call an attorney?

A. I did not, no, sir.

Q. Did any of the officers?

A. Not to my knowledge.

Q. Then you tell us that Porter just said, 'Go ahead and search the premises', what exactly did he say?

A. Lieutenant Coleman told him we'd like to look around and he said, 'Help yourself', or 'Go ahead'."

Chief Greenville County Deputy Sheriff Bill Coleman removed any doubt as to whether or not the petitioner was advised of his rights when upon cross examination he testified as follows:

"Q. When you finally gained admittance you place Porter under arrest at that time?

A. Yes, sir.

Q. Did you then advise him of his constitutional rights?

A. Not at that time.

Q. When did you so advise him? At the Sheriff's Office?

A. I didn't advise him at any time. He was brought up to the Sheriff's and I didn't talk to him much after that.

Q. But you placed him under arrest?

A. Yes, sir."

Miranda v. Arizona, 284 U. S. 436, is clearly controlling on this point. Almost all, if not all, constitutional protections for the citizen can be waived. Waiver doctrine also applies to the right of counsel or to the right to remain silent. But the waiver doctrine rests firmly upon the principle that the man must first be advised of his rights. The record in the instant case is repleat with proof that at no time was the petitioner advised of these rights. The State of South Carolina rested its right to make the search and seizure upon a statement made by the petitioner when admittedly they failed to advise him of his right to not make the statement or to authorize the search, either expressly or impliedly. The admissibility of the evidence seized by the State rested upon whether or not he had consented to the search. If the statements themselves were not admissible, then the objects seized would not have been admissible because they would then have been patently the fruits of an illegal search and seizure. The petitioner was thus denied due process and equal protection of the law.

III

THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW, GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY THE FAILURE OF THE TRIAL JUDGE TO CHARGE THE JURY THE LAW RELATIVE TO ENTRAPMENT, WHEN THERE WAS EVIDENCE BEFORE THE COURT THAT THERE HAS BEEN AN ENTRAPMENT OF THE PETITIONER BY THE POLICE OFFICERS.

At the close of the trial in the State Court, and prior to the Judge's charge, petitioner requested that the Court charge the law of the State of South Carolina relating to entrapment. The Chief witness for the State, State Law Enforcement Division agent Ted M. Owens, testified that he had called the petitioner to place an illegal wager. He did not know, nor had he seen the petitioner prior to December 31, 1965. He testified however, that on September 14, 1965, he called a telephone number in Greenville, South Carolina and spoke with a man with the same name as petitioner. It was established, upon cross examination of this witness that he had initiated the betting process about which he was testifying. The pertinent part of his testimony is, as follows:

> Q. In fact, the purpose of your calling was to get the person at that telephone, who you now identify as Lynn Porter, to accept an illegal bet from you, is that correct?
>
> A. Yes, sir, he accepted it, yes, sir.
>
> Q. You knew at that time that it was illegal to wager or to accept wagers, is that correct?
>
> A. Yes, sir.
>
> Q. It is equally as illegal to bet as it is to accept a bet?
>
> A. Phrase that again.

Q. It is equally as illegal to bet or wager as it is to accept a bet or wager?

A. I would say so, yes, sir.

Q. And the purpose of your calling him was to get him to accept an illegal bet?

A. I called him to accept the bets, see if he would, yes, sir.

Q. And you urged him to, didn't you?

A. No, sir, I did not.

Q. Well, you asked him would he accept a bet, didn't you?

A. Yes, I told him I wanted to bet on his games, yes, sir.

Q. And did he at first refuse?

A. He said, "Wait a minute and I'll call you back," yes, sir.

Q. So at first he refused. He called you back and you told him again you wanted to place a bet, and this time he accepted it, is this right?

A. That's right, yes, sir.

The gist of Owens' testimony is that he persuaded the petitioner to accept a wager after the petitioner had at first refused to do so. It is the contention of the petitioner that such testimony was ample to entitle the petitioner to the requested charge of entrapment. Entrapment in the State of South Carolina has been defined in *State v. Rippey,* 123 S. C. 550, 122 S. E. 397, and *State v. Jacobs,* 238 S. C. 234 and 119 S. E. (2d) 735. Such definition is: "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer."

Whether or not there was entrapment was a question for the jury and petitioner was entitled to such a charge. The refusal to make such charge to the jury deprived the petitioner of due process of law and equal enforcement of law.

SUMMARY

The questions herein presented are of obvious importance to the administration of justice and the conduct of criminal investigation. The record of this case clearly shows a violation of due process in several areas of the proceedings and these departures from due process go to the very heart of the fundamental foundation required in the conduct of criminal justice. The decision of the Court below is believed to be erroneous. The petitioner has asserted in the Courts below, and is asserting here, rights guaranteed to the petitioner by the Constitution of the United States of America and is. of the opinion that he has shown violations of these rights. It is obvious from the record that the petitioner would not have been convicted, had illegally seized evidence not been admitted into evidence. It is also obvious that this evidence was secured by the State Police in violation of the rights and guarantees afforded petitioner by the United States Constitution. Unless Certiorari is granted by this Court, the rights of petitioner will stand as violated and this can only be remedied by this Court applying its standard of measurement to the illegal evidence used against him in the Courts below. The establishment of uniform requirements of due process to insure proper ajudication of criminal justice in State criminal trials warrants remedial action by this Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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